Teng Howe Sing v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–63 OF 2008(Q)
ALAUDDIN PCA, ARIFIN ZAKARIA CJM AND ZULKEFLI FCJ
23 JANUARY 2009

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether sufficient evidence adduced to prove appellant was in possession of dangerous drugs — Whether trial judge justified in making inference that appellant had knowledge that package in his possession contained drugs — Whether appellant raised any reasonable doubt on prosecution's case — Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a),

A police ambush party consisting of five police officers laid an ambush on a person suspected of trafficking in dangerous drugs. The ambush party who were strategically positioned near a coffee shop and a courier services company called Skynet Worldwide Courier Services ('Skynet') spotted the appellant and his college mate ('the college mate') walking towards a motorcycle parked in front of the coffee shop. At that time the appellant was seen carrying a package in his right hand. As the appellant and his college mate approached the motorcycle, the ambush party sprang into action with the officer in charge of the raid shouting 'Polis, jangan lari', whereupon the two men tried to run away with the appellant throwing away the package he was carrying. After the appellant and his college mate were arrested, the officer in charge picked up the package thrown away by the appellant and found it to be a plastic package bearing the logo 'Skynet Worldwide Express' ('the package'). In the package was found an envelope, which contained a plastic container, which in turn contained two blocks of compressed dried leaves. A chemist's analysis confirmed the two compressed blocks to be 371.12g of cannabis. The appellant was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the trial the manager of Skynet testified that he had handed the package to the appellant, on the evening of the date he was arrested, upon the appellant presenting a piece of paper containing numbers that matched the consignment note numbers of the package. The manager further testified that he had asked the appellant to append his signature on the consignment note and that the latter had complied. However, it was observed that the appellant had used a fictitious name to sign the consignment note. In addition, there was evidence to show that after claiming the package from the offices of Skynet and until the time of his arrest, the package was in the physical

possession of the appellant at all times. In his defence the appellant contended that when he signed the consignment note as 'Ling Hang Wei' he was not using a fictitious name but that he was signing on behalf of a friend, who went by the nickname 'Ho Seng', and who had asked him to collect the package from Skynet. The trial judge found that there was sufficient evidence before the court to prove that the appellant was in physical possession of the package in which the drugs were found and that the appellant's use of a fictitious name, clearly established a nexus between his conduct, his flight and the offence in question so as to reasonably infer that the accused had knowledge of the incriminating nature of the contents of the package. At the close of the trial judge, the trial judge after weighing the appellant's evidence against the prosecution's evidence concluded that the prosecution had successfully invoked the presumption under s 37(da) of the DDA and that the appellant had failed to raise any reasonable doubt on the prosecution's case. The appellant being dissatisfied with the conviction and sentence appealed to the Court of Appeal, which affirmed the conviction and sentence. This was the appellant's appeal against that decision. In his grounds of appeal the appellant submitted, inter alia, that the Court of Appeal erred in law in failing to give sufficient judicial appreciation to the issue of the purported fictitious name by the appellant in the given circumstances of the case and that the trial judge had wrongly assumed that the appellant had deliberately used a fictitious name when there was simply no evidence to support that finding. The appellant also argued that the Court of Appeal had completely misdirected itself by way of non-direction as to the weight and status of the evidence of the college mate who was called by the prosecution. The appellant further contended that the trial judge and the judges of the Court of Appeal had erred in that there had been a serious misdirection viz the imposition upon the appellant a duty to speak which the law does not impose.

Held, dismissing the appeal and affirming the conviction and sentence imposed by the High Court:

(1) The crux of the case against the appellant was centred on the issue of possession. Based on the evidence adduced by the prosecution, there was more than sufficient evidence for this court to conclude that the appellant was in possession of the drugs that he was carrying. Thus the High Court and the Court of Appeal were correct in coming to the conclusion that the appellant was in actual possession of the drugs independent of s 37(d) of the DDA (see para 16).

(2) In the instant case when the officer in charge of the raid shouted, 'Polis jangan lari!' the first thing that the appellant did was to throw away the package that he was carrying and to run. Such conduct showed that the appellant had exercised his power to deal with the package as if he was

the owner. The trial judge was also correct in not accepting the appellant's explanation that he behaved in this manner because he thought that the thing he was carrying might be smuggled goods or obscene tapes, simply because there was no evidence to support such an explanation. In fact the appellant's conduct in throwing the package and running away upon hearing shouts by the police pointed to the evidence of knowledge on the part of the appellant as to the contents of the package that he was carrying on that day (see para 19).

(3) In the present case the trial judge was justified in making an inference that the appellant had knowledge that the package contained drugs by drawing a nexus between his conduct of signing a fictitious name in the consignment note, and his flight and the act of throwing away the package upon hearing the words, '*Polis jangan lari!*' (see para 21).

(4) The appellant's contention that the evidence of the college mate who was arrested at the same time as the appellant was relevant and favourable to the appellant was untenable in the circumstances of the case. From the evidence adduced through this witness there was nothing to show that the witness' evidence if considered in the light of the version of the appellant's case would have been relevant and favourable to the appellant. Further, there was no evidence to show that this witness knew 'Ho Seng's' real name was Ling Hang Wei or that the appellant was collecting the package at the request of 'Ho Seng' (see paras 16 & 26).

(5) The appellant's contention that there was a serious misdirection by the trial judge who had imposed on the appellant a duty to speak or disclose relevant information pertaining to 'Ho Seng' was misconceived. The trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely went to show the weight that the court attached to the appellant's defence, which was permitted by the law. In the circumstances of this case, the appellant's failure to provide relevant information about 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the trial judge to disbelieve him. The Court of Appeal was also right to not disturb the trial judge's finding of fact and there was no reason for this court to disturb those concurrent findings of fact by the lower courts (see para 30).

[Bahasa Malaysia summary

Sepasukan polis serbuan seramai lima orang menyerbu seorang yang disyaki mengedar dadah berbahaya. Pasukan serbuan tersebut dengan strategiknya ditempatkan berhampiran sebuah kedai kopi dan syarikat perkhidmatan kiriman cepat Skynet Worldwide Courier Service ('Skynet') dan berjaya

A mengesan perayu dan rakan sekolejnya ('rakan sekolejnya') berjalan ke arah sebuah motosikal yang terletak di hadapan kedai kopi tersebut. Pada masa itu, perayu didapati membawa satu bungkusan di tangan kanannya. Ketika perayu dan rakan sekolejnya menghampiri motosikal itu, pasukan serbuan tersebut menerkam ke arah mereka dan menjerit, 'Polis, jangan lari!', B membuatkan kedua-dua lelaki tersebut lari dan perayu melempar bungkusan yang dibawanya. Setelah perayu dan rakan sekolejnya ditangkap, pegawai yang bertugas mengambil bungkusan yang dilemparkan itu dan mendapati bungkusan tersebut merupakan bungkusan plastik dengan logo 'Skynet Worldwide Express' ('bungkusan'). Didapati satu sampul surat dalam C bungkusan tersebut yang mengandungi bekas plastik yang mana di dalamnya ada dua bongkah dedaunan kering yang mampat. Analisa kimia mengesahkan dua bongkah yang mampat itu merupakan 371.12g kanabis. Perayu dituduh dengan kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Semasa perbicaraan, D pengurus Skynet memberi keterangan bahawa dia menyerahkan bungkusan tersebut kepada perayu, pada waktu malam, hari dia ditangkap, ketika perayu menyerahkan sekeping kertas mengandungi nombor-nombor sepadan dengan nombor-nombor nota konsainan bungkusan tersebut. Pengurus selanjutnya menyatakan bahawa perayu menurunkan tandatangannya di nota E konsainan tersebut setelah diminta berbuat demikian. Walau bagaimanapun, perayu menggunakan nama samaran untuk menandatangani nota konsainan itu. Terdapat bukti yang menunjukkan selepas menuntut bungkusan tersebut dari pejabat Skynet dan sehingga masa dia ditangkap, bungkusan tersebut berada dalam milikan fizikal perayu pada setiap saat. Dalam pembelaannya, F perayu menyatakan bahawa apabila dia menandatangani nota konsainan tersebut sebagai 'Ling Hang Wei', dia bukannya menggunakan nama samaran sebaliknya dia menandatangni bagi pihak kawannya, yang digelar 'Ho Seng' dan memintanya mengambil bungkusan tersebut dari Skynet. Hakim bicara mendapati bahawa adanya keterangan yang mencukupi membuktikan perayu G memiliki bungkusan yang mana dadah tersebut dijumpai dan perayu menggunakan nama samaran, jelas menunjukkan kaitan antara perlakuannya, perbuatannya melarikan diri dan juga kesalahan yang dipertuduh, yang mana, sewajarnya menyimpulkan bahawa perayu maklum tentang isi kandungan bungkusan tersebut yang menyalahi undang-undang. H Pada penutupan bicara, setelah menimbangkan keterangan-keterangan perayu dan pihak pendakwaan, hakim memutuskan bahawa pihak pendakwaan berjaya mengguna pakai anggapan di bawah s 37(da) ADB dan bahawa perayu gagal menimbulkan keraguan yang munasabah dalam kes pendakwaan. Tidak berpuas hati dengan sabitan dan hukuman, perayu I merayu ke Mahkamah Rayuan, yang mana mengesahkan sabitan dan hukuman sebelumnya. Ini merupakan rayuan perayu terhadap keputusan Mahkamah Rayuan. Dalam alasan-alasan rayuannya, perayu menyatakan, antara lain, bahawa Mahkamah Rayuan terkhilaf dari segi undang-undang apabila gagal memberikan penghargaan kehakiman terhadap isu nama

samaran perayu dalam keadaan-keadaan kes dan bahawa hakim bicara telah tersalah anggap bahawa perayu dengan sengaja menggunakan nama samaran sedangkan tiada keterangan yang menyokong keputusan tersebut. Perayu juga berhujah bahawa Mahkamah Rayuan telah tersalah arah apabila tiada arahan terhadap pertimbangan dan status keterangan rakan sekolejnya yang dipanggil oleh pihak pendakwaan. Perayu seterusnya mengemukakan bahawa hakim bicara dan hakim Mahkamah Rayuan telah salah apabila berlakunya satu salah arah yang serius iaitu memaksa perayu untuk bersuara sedangkan undang-undang tidak memaksanya berbuat demikian.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi:

(1) Pokok persoalan kes perayu tertumpu kepada isu pemilikan. Berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan, adalah lebih dari cukup keterangan-keterangan bagi mahkamah ini untuk memutuskan bahawa perayu memiliki dadah yang dibawanya. Oleh itu, keputusan Mahkamah Tinggi dan Mahkamah Rayuan adalah tepat apabila memutuskan bahawa perayu sebenarnya memiliki dadah tersebut, tanpa bergantung kepada s 37(da) ADB (lihat perenggan 16).

(2) Dalam kes ini, apabila pegawai bertugas serbuan menjerit, 'Polis, jangan lari!', perkara pertama yang perayu lakukan ialah melemparkan bungkusan yang dibawanya dan melarikan diri. Itu menunjukkan bahawa perayu melakukan apa yang patut dibuat terhadap bungkusan tersebut, seolah-olah dialah pemiliknya. Hakim bicara juga betul apabila tidak menerima penjelasan perayu bahawa dia berkelakuan sebegitu oleh sebab dia fikirkan barang yang dibawanya mungkin barangan seludup atau pita-pita lucah, kerana sememangnya tidak ada keterangan yang boleh menyokong penjelasannya. Malahan, tindakan perayu melemparkan bungkusan tersebut dan melarikan diri apabila terdengar teriakan polis membuktikan bahawa perayu tahu isi kandungan bungkusan yang dibawanya pada hari itu (lihat perenggan 19).

(3) Dalam kes ini, hakim bicara adalah wajar apabila membuat kesimpulan bahawa perayu tahu bungkusan tersebut mengandungi dadah dengan menghubung kaitkan antara perbuatannya menggunakan nama samaran di nota konsainan, perbuatannya melarikan diri dan tindakannya melemparkan bungkusan tersebut tatkala terdengar teriakan, 'Polis, jangan lari!' (lihat perenggan 21).

(4) Hujahan perayu bahawa keterangan rakan sekolejnya yang ditangkap pada waktu yang sama, adalah relevan dan membantu dalam kes perayu, tidak dapat dipertahankan dalam keadaan kes ini. Daripada

keterangan-keterangan yang dikemukakan melalui saksi ini, tiada apa dapat membuktikan bahawa keterangannya relevan dan membantu kes perayu. Tambahan lagi, tiada keterangan yang membuktikan bahawa saksi ini tahu bahawa nama sebenar 'Ho Seng' ialah Ling Hang Wei atau perayu mengambil bungkusan tersebut atas permintaan 'Ho Seng' (lihat perenggan 16 & 26).

(5) Hujahan perayu yang menyatakan bahawa berlakunya salah arah yang serius oleh hakim bicara yang memaksa perayu bersuara atau mendedahkan maklumat yang relevan berkenaan 'Ho Seng' adalah satu salah tanggap. Ulasan-ulasan hakim bicara berkenaan pendedahan lewat identiti sebenar 'Ho Seng' ketika peringkat pembelaan hanyalah menunjukkan beratnya keterangan ini kepada pembelaan kes perayu, pada pandangan mahkamah, yang mana dibenarkan oleh undang-undang. Dalam keadaan kes ini, kegagalan perayu memberikan maklumat mengenai 'Ho Seng' supaya pihak polis dapat menjalankan siasatan lanjut terhadap kebarangkalian pembelaannya, membolehkan hakim bicara agar tidak mempercayai perayu. Mahkamah Rayuan juga membuat keputusan yang tepat apabila tidak mengganggu kesimpulan fakta hakim bicara dan tiada sebab juga bagi mahkamah ini mengusik keputusan-keputusan bersama oleh mahkamah-mahkamah sebelum ini (lihat perenggan 30).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Abdullah Zawawi bin Yusof v PP [1993] 3 MLJ 1, FC (refd)
Chan Pean Leon v PP [1956] MLJ 237, HC (refd)
DPP v Brooks [1974] 2 All ER 840, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1, FC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585, HC (folld)
PP v Munusamy [1980] 2 MLJ 133, FC (refd)
Tan Ah Tee & Anor v PP [1980] 1 MLJ 9, CA (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Common Gaming Houses Ordinance 1953
Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a)

Appeal from: Criminal Trial No Q-05–77 of 2003 (Court of Appeal, Putrajaya)

Orlando SW Chua (Wong Orlando Chua & Kuok) for the appellant.
Mangai (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli FCJ:

[1] The appellant was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') in the High Court at Sibu as follows:

> That you, on 17 March 1999 at about 7.50 pm, in front of WWW Chat Cafe, Jalan Kai Peng, Jalan Tuanku Osman, Sibu in the State of Sarawak, on your own behalf did traffic in a dangerous drug, to wit, 371.12g of Cannabis, and you thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) punishable under s 39B(2)(a) of the same Act.

[2] At the end of the trial, the appellant was convicted and sentenced to death by the High Court. Being dissatisfied with the said decision, the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the conviction and sentence imposed by the High Court. It is against this decision of the Court of Appeal which the appellant is now appealing to this court.

BACKGROUND FACTS

[3] The relevant background facts of the case are as follows.

[4] On 17 March 1999, at about 6pm, PW2 led a team of five policemen consisting of PW3, PW4, PW7, Sgt Faizal Abdullah and L/Cpl Tambahan Geraji to lay an ambush on a person suspected of trafficking in dangerous drugs. PW2 positioned his men at strategic places near two business premises, namely, a coffee shop named WWW Chat Cafe and a courier services company called Skynet Worldwide Courier Services ('Skynet') situated on the second floor of the block of shops at Jalan Kai Peng and Jalan Tuanku Osman, Sibu. At about 7.50pm, PW2 saw the appellant and PW12 coming down the staircase that led to the offices of Skynet. Both the appellant and PW12 were later seen walking towards a motorcycle parked in front of the WWW Chat Cafe. PW2 saw that the appellant was carrying a package in his right hand. As the appellant and PW12 approached the motorcycle, PW2 and his men sprang into action with PW2 shouting 'Polis, jangan lari', whereupon the two men tried to run away with the appellant throwing away the package he was carrying. It fell next to the motorcycle. A scuffle then took place after which the appellant and PW12 were arrested. After the appellant

A and PW12 were arrested, PW2 picked up the package thrown away by the appellant and found it to be a plastic package bearing the logo 'Skynet Worldwide Express'. In it PW2 found an envelope. It was addressed to 'Jeffrey Wong Sibu 016–8666577'. Written on the reverse side of the envelope were the words 'From: Ah Mui No. 38, Jalan SS5/12, PJ Sel. No. 0198871268.'
B In the envelope PW2 found a package wrapped in Chinese newspaper and on unwrapping the newspaper, he found a plastic container. On opening the container, PW2 found another package wrapped in Chinese newspaper bound in cellotape. On opening the package, PW2 found two blocks of compressed dried leaves. One block was larger than the other. PW2 then
C brought the appellant, PW12 and the exhibits he had seized at the scene, back to the Central Police Station Sibu where all exhibits were marked by him. At the police station, the appellant was again searched and from him three other items were seized:

D (a) a Skynet consignment note (exh P4);

(b) a wallet; and

(c) a handphone.

E **[5]** Upon analysis PW1 ('the chemist') confirmed that the two compressed slabs contained a net weight of 371.12g of cannabis.

FINDINGS OF THE HIGH COURT

F **[6]** The learned High Court judge found that there was sufficient evidence before the court to prove that the accused was in physical possession of the package in which the drugs were found. This evidence was provided by the testimony of Abd Rahman Mohd Sharif (PW11) the manager of Skynet, Sibu, who handed the package to the accused on the evening of 17 March
G 1999 and obtained his signature in acknowledgment on a copy of the consignment note (exh P4). The evidence showed that after claiming the package from Abdul Rahman and until the time of his arrest, the package was in the physical possession of the accused at all times. That evidence was provided by the testimony of the police officers in the ambush team, namely
H PW2, PW3, PW4 and PW7 who all gave evidence to the effect that the accused was seen coming down from the staircase leading to the Skynet offices and thereafter proceeding towards a motorcycle carrying a package which he threw away upon being ambushed by the police team. As the chemist, PW1's evidence showed that the total combined weight of the
I cannabis in 'A6' and 'A7' weighed 371.12g, the learned High Court judge found the presumption under s 37(da) of the DDA had been successfully invoked by the prosecution and the accused was to be presumed to be trafficking in the said drug. The accused was accordingly called to enter upon his defence.

[7] At the close of the trial, the learned trial judge after weighing the appellant's evidence against the prosecution's evidence, came to the conclusion that the appellant had failed to raise any reasonable doubt on the prosecution's case that he was in possession of the drugs that he was carrying at the time of his arrest and had failed to rebut the presumption of trafficking raised against him.

FINDINGS OF THE COURT OF APPEAL

[8] The Court of Appeal in affirming the decision of the High Court in its judgment, inter alia, stated as follows:

> We are satisfied that the learned trial judge has considered fully all the evidence given on behalf of the defence and having weighed it against the prosecution's case he has come to the correct conclusion that the accused has not raised any reasonable doubt to show that the accused was not in actual possession of the package at the material time and that he did not know that the package contained drugs. As the weight of the proscribed drugs in the possession of the accused exceeded 200g of cannabis, s 37(da)(vi) of Dangerous Drugs Act 1952 triggered the presumption of trafficking in the said drugs against the accused. The learned trial judge has correctly concluded, that on the evidence before him, the accused has failed to rebut the statutory presumption of trafficking (see p 14 Vol 1 of the appeal record).

THE APPEAL

[9] Learned counsel for the appellant in his argument before us had advanced a number of grounds of appeal. However, we shall deal only with the relevant grounds which were focused on the following issues.

[10] It was submitted before us that the Court of Appeal erred in law failing to give sufficient judicial appreciation to the issue of the purported use of fictitious name by the appellant in the given circumstances of the case. It is the contention of the appellant that the learned trial judge had misdirected himself as to the issue of 'knowledge' which is the key ingredient of possession. Learned counsel for the appellant drew our attention to that part of the judgment of the trial judge on this issue as follows:

> Reverting to the facts of our case, the conduct of the accused in trying to run away and throwing away the package he was carrying on hearing the words 'Polis, jangan lari' being shouted at him, coupled with the fact that when he collected the package only a few minutes earlier from the offices of Skynet he had used the name of 'Ling Hang Wei' instead of his own name, clearly established a nexus between his conduct, his flight and the offence in question. By using a name other than his own when collecting the package and later by throwing it away when ambushed, the accused had taken steps to conceal his true identity and dissociate himself with

A what constitute the offence. There was, therefore, clear and compelling evidence from which it can be reasonably inferred that the accused had knowledge of the incriminating nature of the contents of the package ie that it contained drugs (see pp 5–6 Vol 1 of the appeal record).

B

[11] It was submitted by learned counsel for the appellant that based on the above finding the learned trial judge had already nailed the issue of knowledge on the fact that the appellant had deliberately used a 'fictitious' name, 'Ling Hang Wef' instead of his own name so as to dissociate himself from the incriminating item should he be caught eventually. According to the C learned trial judge, the appellant's alleged attempt to flee, his alleged throwing away of the incriminating package culminating in his conscious intent to dissociate himself by the use of a fictitious name clearly established a nexus between his conduct, his flight and the offence in question. The appellant, however, had contended that 'Ling Hang Wet' was in fact the actual name of D a friend of his, going by the nickname 'Ho Seng' who had asked him to collect something from the courier service office.

[12] It was also submitted for the appellant that on the envelope of the E consignment note (exh P4) there was already a name 'Jeffrey Wong' written on it as the intended addressee. To the appellant, it would be more sensible for the appellant to simply sign as the intended addressee 'Jeffrey Wong' in the acknowledgment receipt to ensure a smoother transmission of the said package and to avoid any suspicion if indeed he had the necessary mens rea. F By so doing he would equally achieve the same objective.

[13] Still on the same issue it was argued for the appellant that the learned trial judge had wrongly assumed that the appellant had deliberately used a fictitious name when there is simply no evidence to support that finding. G Learned counsel for the appellant referred to us that part of the testimony of PW11 Abdul Rahman bin Mohd Sharif, the then branch manager of Skynet to prove his point as follows:

H The accused signed and wrote his name and date and time on the consignee's copy of the consignment note in my presence. I saw him do it. The name written down by the accused on the consignee's copy was Ling Hang Wei. The consignment note which the accused signed is addressed to Mr. Jeffrey Wong. There is a telephone contact number for Mr. Jeffrey Wong given in the consignment note. The phone number is 016-8666577 (see p 155 Vol 2 of the appeal record).

I

[14] Based on the above learned counsel for the appellant submitted that at no time was the appellant asked by PW11 or anyone for that matter, to sign the acknowledgement or to write down his real name on the consignee's copy of the consignment note. To the appellant the learned trial judge's finding

might be justified if the appellant was asked specifically by PW11 to acknowledge receipt by signing or writing down his real name and he had deliberately chosen to use a name other than his own. That might point to mens rea. Further, it was argued that it was not in evidence that PW11 had made known to the appellant that it was a mandatory requirement for the appellant to disclose his real name when collecting the said package.

[15] For all the reasons given above the appellant contended that the learned trial judge had seriously misdirected himself by omitting to address his mind to this glaring issue. The learned trial judge had therefore not viewed the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was then fairly open to him to exonerate himself.

[16] With respect we find that the above argument and reasonings made on behalf of the appellant on the issue of purported use of a fictitious name by the appellant untenable in the circumstances of the case. In our view the crux of the case against the appellant is centred on the issue of possession. We find on the evidence adduced by the prosecution, the High Court and the Court of Appeal were correct in coming to the conclusion that the appellant was in actual possession of the said drugs independent of s 37(d) of the DDA.

[17] PW11 testified that he handed over the package P3B to the appellant at about 7.50pm in the Skynet office upon the appellant presenting a piece of paper containing numbers that matched the consignment note numbers of P3B. PW11 further testified that he told the appellant to append his signature on the consignment note and that the appellant did sign and write his name, date and time in P4 in his presence. It was the evidence of PW2 that he and his men were waiting at strategic places around the WWW Chat Cafe and Skynet for about two hours, when he saw the appellant and PW12 coming down the staircase (that led to the offices of Skynet). PW2 saw the appellant carrying a package. The appellant and PW12 were seen walking towards a motorcycle. Then PW2 and his men rushed towards them with PW2 shouting 'Polis, jangan lari'. Upon hearing that, the appellant and PW12 tried to run away, with the appellant throwing away the package that he was carrying and it fell next to the motorcycle. A scuffle took place and thereafter the appellant and PW12 were arrested. PW2 picked up the package thrown away by the appellant and found it to contain the drugs (P3K and P3L).

[18] We therefore find that there was more than sufficient evidence for this court to conclude that the appellant was in possession of the drugs that he was carrying. In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237,

Thompson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:

> Possession itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) p 304: A movable thing is said to be in the possession of a person when he is so situated with respect to it that *he has the power to deal with it as owner to the exclusion of all other persons*, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. *It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances ... *There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention ... But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so ...*
>
> (Emphasis added.)

[19] In our instant case it is to be noted when PW2 shouted '*Polis, jangan lari*' the first thing that the appellant did was to throw away the package that he was carrying and ran away. Obviously that conduct showed that the appellant had exercised his power to deal with the package P3B as if he was the owner. Otherwise he would not have thrown it away. In the Federal Court case of *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1, the court referred to a Singapore case of *Tan Ah Tee & Anor v Public Prosecutor* [1980] 1 MLJ 9 on the issue of possession and held at p 9 as follows:

> Even if there were no statutory presumptions available to the prosecution, *once the prosecution had proved the fact of physical control or possession of the plastic bag* and the circumstances in which this was acquired by and remained with the second appellant, the trial Judges would be justified in finding that *she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial judges accepted or which raised a doubt in the minds that she had possession of the contents within the meaning of the Act*. (Emphasis added.)

[20] Still on the issue of knowledge to establish possession we would refer to the words of Lord Wilberforce in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 at p 394 where His Lordship held that:

> In all such cases, *the starting point will be that the accused had physical control of something — a package, a bottle, a container — found to contain the substance. This is evidence — generally strong evidence of possession. It calls for an explanation*. The explanation will be heard and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession.
>
> (Emphasis added.)

[21] In the present case we are of the view the learned trial judge is justified in making an inference that the appellant had knowledge that the package P3B contained drugs by drawing a nexus between his conduct of signing 'Ling Hang Wef' instead of his name at the receiver's column in P4, and his flight and the act of throwing away the package upon hearing the shouts of '*Polis, jangan lari*'. Taken together all the facts mentioned above, it would appear to be too plain and obvious for the appellant not to know the nature of the things found in his possession. As such we are of the considered view that the learned trial judge and the court of appeal were clearly right in holding that the prosecution had proved that the appellant was in possession of the drugs that he was found carrying on that day.

[22] We also would take the view that the appellant's conduct in throwing the package and running away upon hearing shouts by the police points to the evidence of knowledge on the part of the appellant as to the contents of the package that he was carrying on that day. In the case of *Abdullah Zawawi bin Yusof v Public Prosecutor* [1993] 3 MLJ 1, this court came to the conclusion that the accused's conduct in taking to his heels upon the police announcing the discovery of the drugs in the box was equivocal because the conduct of the accused was equally consistent with the accused having been in a state of pure panic, bearing in mind that it was only after the police announced the discovery of the drug that the accused took to his heels. This court therein said this was distinguishable from the facts of the case in *Deputy Public Prosecutor v Brooks* [1974] 2 All ER 840. where the accused, who occupied the driver's seat of a stationary van which contained more than one thousand pounds of *ganja*, together with several others in the van, scrambled out and ran off, when the police officers hurried towards the van even before the discovery of the drugs. However, this court in the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 had discussed the applicability of evidence of conduct to infer knowledge as discussed in *Abdullah Zawawi*'s case and *Brook*'s case and held at p 39 as follows:

> The difference in both the cases is that in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within

A the meaning of s 8 in view of the possibility of access to the house by others, it is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* is therefore authority only to this extent on the other hand in *DPP v*
B *Brooks* [1974] 2 All ER 840 *there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context within the meaning of s 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the*
C *accused himself as required by s 9.*

(Emphasis added.)

[23] In the present case it is to be noted that the appellant upon being
D approached by the police even before his arrest and before the discovery of the drugs had attempted to escape by running away and throwing away the package P3B that he was carrying in his right hand. Therefore we are of the view that it is correct to infer from the appellant's conduct that he had knowledge of the contents of the package P3B until he gives a plausible
E explanation. As a matter of fact in this case the learned trial judge did not accept the appellant's explanation that he released the package P3B upon hearing the police shouting '*Polis, jangan lari*' because he thought that the thing he was carrying might be smuggled goods or obscene tapes, simply because there was no evidence to support such an explanation.

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[24] Learned counsel for the appellant had also argued that the court of appeal had completely misdirected itself by way of non-direction as to the weight and status of the evidence of PW12, Moh Yong Ming who was called by the prosecution. The appellant contended that the evidence of PW12 was
G relevant and favourable to the appellant and PW12's evidence was never challenged nor impeached by the prosecution. In this case PW12 was the college mate of the appellant who was arrested at the same time as the appellant. PW12 had upon the police's ambush also been seen to be struggling and trying to flee. PW12 in his examination-in-chief had stated,
H inter alia, as follows:

> When we had almost finished our drink, Teng Howe Sing informed me that his friend had asked him to collect something and he asked me to wait at the coffee-shop (see p 159 Vol 2 of the appeal record.)

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[25] It is the appellant's contention that PW12's testimony as aforesaid is most relevant as it goes to show the intention and state of mind of the appellant at the material time. The appellant could have chosen not to tell PW12 anything but stealthily gone off to collect the incriminating package

if indeed the appellant had a guilty mind. The appellant could also have gone there all on his own without the company of PW12, to carry out that alleged act.

[26] We also find that the above contention of the appellant is untenable in the circumstances of the case. From the evidence adduced through PW12 there is nothing to show that PW12's evidence if considered in the light of the version of the appellant's case would have been relevant and favourable to the appellant. PW12 was called by the prosecution as a witness merely to show he was present together with the appellant at the scene of the alleged offence and the prosecution must have been satisfied that PW12 was not involved in the commission of the offence. Hence the question of PW12's evidence not being challenged or his credit impeached by the prosecution does not arise at all. It is to be noted in this case that PW12's evidence was that the appellant only mentioned 'Ho Seng' as the appellant's friend but PW12 himself have never met this 'Ho Seng'. Furthermore, there is no evidence to show that PW12 knew 'Hong Seng's real name was Ling Hang Wei or that the appellant was collecting the package P3B at the request of 'Hong Seng'.

[27] Learned counsel for the appellant had also argued that the Court of Appeal erred in law in not directing its mind sufficiently on the serious misdirection by the learned trial judge who had imposed on the appellant a duty to speak/disclose relevant information in particular regarding the person named 'Ho Seng' in his cautioned statement to the police. In this case the Court of Appeal had made the following observation with regard to the finding of the learned trial judge on this issue as follows:

> However, the learned trial judge did not believe the story of the accused regarding 'Ho Seng'. We have no reason to disturb that finding. This is what he said in his grounds of judgment:
>
> > For the reasons that follow I do not believe the story of the accused regarding 'Ho Seng'. Since it is the accused's case that he had done all what he did at the request of 'Ho Seng' it is logical and reasonable to expect that after his arrest, he would at the earliest opportunity provide all relevant information regarding 'Ho Seng' to the police. The accused did have that opportunity when he gave his cautioned statement to the police. In it he revealed the name 'Ho Seng' and that he had spoken to 'Ho Seng' at least three times on 17 March 1999 but he never gave any further information about 'Ho Seng', such as his phone number or any place or places where he could be found at or contacted. In his testimony the accused said that 'Ho Seng's telephone number was 016-8666577 but he did not mention this in his cautioned statement. Most importantly, the accused did not reveal that when he referred to 'Ho Seng', he was referring to a person by his nickname, and that 'Ho Seng's real name was Ling Hang Wei. Since the accused had set out to make a exculpatory cautioned statement by saying that it was 'Ho Seng' who had asked him to collect the package, it is only reasonable to expect

A that if what he said was true, he would also go on to reveal everything he knew about 'Ho Seng' in his statement. But he did not do so. The investigation officer Inspector Alekzandra (PW14) testified that he interrogated the accused on three occasions, namely, on 18 March 1999 after the accused was remanded in custody, on 19 March 1999 when the accused was brought out of the lock-up to have his finger prints taken, and on 22 March 1999 after the accused had given his cautioned statement to Inspector Lee, but the accused had not revealed the information I have referred to. Although the accused did say that a policeman Corporal Charles Tuoh (now deceased) came to see him in the lock-up after his arrest and in response to a request from Charles Tuoh he had tried, without result, to telephone 'Ho Seng' there is no evidence that the accused gave any further information to Charles Tuoh about 'Ho Seng' than what was revealed by him in his cautioned statement.

In my judgment the quality, extent and result of any police investigation into 'Ho Seng' depended very much on proper information or leads being provided to the police by the accused himself. Since the accused was referring to 'Ho Seng' by nickname only it was crucial that he make the police aware of this fact, and since it was the accused who knew the real name of 'Ho Seng' it was imperative that he informed the police about this too, but he did not. Likewise, it would be the accused himself, who would know who his circle of friends were and who amongst them knew 'Ho Seng', whether by his nickname or real name. It was therefore imperative that the accused furnished this information to the police for their investigation purposes but without his having done so there is no basis for his complaint about the police investigations (see pp 11–14 Vol 1 of the appeal record.)

[28] After having quoted the learned trial judge in extenso the Court of Appeal went on to agree with His Lordship and said:

> We are satisfied that the learned trial judge has considered fully all the evidence on behalf of the defence and having fully weighed it against the prosecution's case he has come to the correct conclusion that the accused has not raised any reasonable doubt to show that the accused was not in actual possession of the package at the material time and that he did not know that the package contained drugs.

[29] It is the contention of the appellant that the above findings clearly demonstrated that both the learned trial judge and the Court of Appeal have erred in that there has been a serious misdirection viz the imposition upon the appellant a duty to speak which the law does not impose. Such a misdirection as contended by the appellant constitutes a serious misdirection as obviously an adverse inference would have been drawn against the appellant.

[30] With regard to the above contention of the appellant it is our judgment that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding 'Ho Seng' to the police at the time of his arrest or when his cautioned statement (D2) was

recorded five days after his arrest does not mean that the learned trial judge had imposed on the appellant a duty to speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. The learned trial judge's comments on the late disclosure of the real identity of 'Ho Seng' at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law. On this point we would like to refer to the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p 591 said that:

> ... So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.

[31] In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[32] Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities to provide information about 'Ho Seng', ie at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about a 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

CONCLUSION

[33] We are of the view the learned trial judge had made a correct finding of fact upon evaluation of the defence case that he did not believe the story regarding 'Ho Seng' and that it does not raise any reasonable doubt in the prosecution's case. The Court of Appeal judges had expressed their view that they have no reason to disturb that finding. On these two concurrent findings of fact by the courts below we would refer to the Federal Court's case of *Public Prosecutor v Munusamy* [1980] 2 MLJ 133 at p 136 wherein the Federal Court had this to say:

> ... Where there have been concurrent findings of fact in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts ...

A **[34]** For the reasons stated we would dismiss the appellant's appeal and affirm the conviction and sentence passed by the learned trial judge.

Appeal dismissed. Conviction and sentence affirmed.

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Reported by K Nesan

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